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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

NO. 39584-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

DEPUTY

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STATE OF WASHINGTON, Respondent

v.

LOUIS GEORGE IHRIG, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROBERT LEWIS  
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-00034-4

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BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant. Where additional information is needed, it will be supplemented in the argument section.

II. RESPONSE TO ARGUMENT

The argument raised on appeal is that the defendant was denied effective assistance of counsel, where his attorney failed to object to repeated instances of prosecutorial misconduct. Specifically, the defendant maintains that many of the comments made in the closing argument by the prosecutor were improper because she repeatedly injects her personal opinion about the evidence and further argues inferences from the evidence for which there was no foundation. Further, the argument appears to boil down to a plea by the prosecutor to the emotions of the jury, rather than their reason and, thus, leads to the injecting of her personal opinion about the evidence.

To establish that the right to effective assistance of counsel has been violated, the defendant must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). As the Supreme Court explained in Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134[, 102 S. Ct. 1558, 1574-75, 71 L. Ed. 2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, [350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1995)].

-(Strickland, 466 U.S. at 689).

A decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185

(1994). Deciding whether and when to object to the admission of evidence is “a classic example of trial tactics.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). When trial counsel's actions involve matters of trial tactics, the Court is reluctant to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, *review denied*, 99 Wn.2d 1013 (1983). And the Appellate Court presumes that counsel's performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

In order to show that counsel was ineffective for failing to object to the remarks of the prosecutor, the defendant must show that the objection would have been sustained. *See* In re Pers. Restraint of Davis, 152 Wn.2d 647, 748, 101 P.3d 1 (2004). Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). “Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.” *Id.*

The Appellate Court reviews a prosecuting attorney's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In

determining whether prosecutorial misconduct occurred, the Court first evaluates whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the statements were improper and an objection was lodged, the Court then considers whether there was a substantial likelihood that the statements affected the jury. Reed, 102 Wn.2d at 145. Absent a proper objection and a request for a curative instruction, however, the defense waives the issue of misconduct unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006) (*citing State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)).

To determine whether the prosecutor is expressing a personal opinion about the defendant's guilt, independent of the evidence, the Court views the challenged comments in context. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, ... it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and

conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*

*-(McKenzie, 157 Wn.2d at 53-54 (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).*

Finally, the Court presumes the jury follows the trial court's instructions. State v. Hopson, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989). Moreover, comments that might elicit sympathy for the victim are not necessarily improper. State v. Davis, 141 Wn.2d 798, 873, 10 P.3d 977 (2000) (prosecutor's comment that the defendant had acted as a "judge, jury, and executioner" for the victim was not improper.) While it is improper for a prosecutor to vouch for the credibility of a witness, no prejudicial error arises unless counsel clearly and unmistakably expresses a personal opinion as opposed to arguing an inference from the evidence. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (*citing State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)), *cert. denied*, 129 S. Ct. 2007 (2009).

The State submits that in our case, the experienced defense attorney, rather than objecting or trying to object to what the State maintains is perfectly legitimate argument given the totality of the closing statement by the prosecutor, chooses to attack the claims of personal

comments by the prosecutor or attempts at sympathy to the jury in his closing argument. This is a trial tactic or an overall strategy being used by the defense.

Thus, the defense attorney begins his closing argument by attacking the prosecutor's closing as nothing more than an emotional appeal to the jury and the fact that the Judge has instructed the jury to not allow this to occur.

Now, one of the first things that I talked about in jury selection – and I stressed it over and over and over again – is that this is not an emotional decision that you have to make, okay? But right out of the box, the State's opening words to you in closing arguments are, little girls should be safe.

Rather than talk about the facts, talk about the testimony, talk about the evidence, they wanted to talk about the emotional aspects of it. She should have been safe that night. Well, of course, she should have been safe that night. Of course, little girls should be safe. But it's an attempt to get you to look at this emotionally. And the Judge instructed you and will instruct you again, if necessary, that neither passion nor prejudice should guide your judgment.

You've got to look at this clinically, you've to look at the testimony and you can't hear a voice in the back of your head driving a train down the track saying, little girls should be safe. That's wrong, that's preying upon your emotions. Please don't do that.

-(RP 272, L5 – 25)

So there's no misunderstanding as to the tactical decision being made by the defense attorney, he sums it up near the end of his closing argument in the same logical way:

I submit to you, we don't know. She said it did. Her details are a little unbelievable. He said it didn't. Counsel thinks his details are a little unbelievable. But the reality is, there's no hard evidence either way that it did or didn't happen. And therefore, I submit to you that there's reasonable doubt. If you don't know, if you're not sure, if you want to risk your life, fine, but why would you risk his?

You've got a tough decision to make; I told you that from the beginning. Everybody's coming at you, protect the children, little girls shouldn't be in unsafe situations, she has a right to sleep in a – absolutely, positively, but that's what makes that train go down the track, that emotional argument. Please, please look at this rationally, look at the evidence rationally.

No little girl should be raped, absolutely not, but that didn't happen here. There's reasons for everything that you heard. The questioning of the child was improper, the emotions of the adults got in the way, and the system took over and here we are today. Please, stop the madness on this. I submit to you that the State has not proved its case beyond a reasonable doubt, doubt for which a reason exists.

There's a very sane, simple, logical answer for what happened there that night and it's not a rape, it's not a rape. Was there a touching, an inadvertent touching? I don't know, but there sure as heck was no one to two minutes of digital penetration while she's on his lap with her legs spread apart and her panties off, and the wife an arm's length away. It doesn't make sense, didn't happen, didn't happen. She's a beautiful little girl, she's a happy little girl,

she's not showing any signs of any problems. School's going well, lots of friends.

Find Mr. Ihrig not guilty. Thank you.

-(RP 280, L22 – 282, L8)

The State submits that this is a tactical decision being made by the defense. The fact of no objections being made, therefore, cannot be the basis for ineffective assistance of counsel because there was a clear plan, a clear approach, to combating the emotional aspects of the closing argument. Further, the State submits, that there is nothing inappropriate with the closing argument given by the prosecutor. She is arguing inferences and reasonable alternatives and conclusions that the average person would clearly understand as being reasonable under the circumstances. When looking at the totality of the closing argument and given the nature of the evidence in the case, it is obvious that there is no impropriety by the prosecution. With that in mind, there are further grounds for the State to submit that there was no misconduct of the prosecutor, nor was there any ineffective assistance of counsel for the defense.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 20 day of April, 2010.

Respectfully submitted:

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